88-1505

SUPREME COURT OF THE UNITED STATES

Supreme Court
FILE
DEC 24
JOSEPH F. SPAN
CLERK

HERBERT G. BROOKENS)

Petitioner)

v.)

STATE OF WISCONSIN)

Respondent)

PETITION FOR CERTIORARI
FROM THE SUPREME COURT OF WISCONSIN

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QUESTIONS PRESENTED

I

Whether a defendant, after exercising his Constitutional right to a jury trial was acquitted of assault, battery, and theft was denied due process because of prosecutorial retaliation when the prosecutor subjected defendant to additional charges and penalties of intimidating a witness and victim arising from the initial incident.

II

Was the defendant deprived of due process due to a material omission in the criminal complaint and unconstitutionally vague and overbroad intimidation of witness penal statutes.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Art. 1257(3)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article V

"No person...shall...be subject for the same offense to be twice put in jeopardy of life and limb."

U.S. Constitution, Article XIV

"No state... shall...deprive any person of life, liberty or property, without due process of law."

Wisconsin Statute

Section 940.42

"Except as provided in s. 940.43, whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor.

Section 940.43, provides in relevant part:

Whoever violates s. 940.42 under any of the following circumstances in guilty of a Class D. Felony:

...

(3) Where the act is accompanied by ...[an] implied threat of force....

STATEMENT OF THE CASE

This unreported decision of the Wisconsin Court of Appeals, entered on June 23, 1988, certiorari by the Wisconsin Supreme Court on September 25, 1988, arises out of a domestic dispute centered on September 27, 1982, when Herbert Brookens was accused of, and charged with assault, battery, theft of his own stereo set. A jury on October 6, 1983 tried and acquitted him of the assault and battery charges. Prior to the September 27, 1982, trial, on

September 22, 1983, while incarcerated pending trial, defendant allegedly intimidated a witness to the September battery. The jury trial on the witness (and victim) intimidation charges were held on July 31, 1985, for which he was acquitted of the victim intimidation charge and convicted of the witness intimidation charge. The witness intimidation verdict was appealed and affirmed by the Wisconsin Court of Appeals and Supreme Courts.

REASONS FOR GRANTING CERTIORARI

This case turns on the Wisconsin Court's erroneous interpretation of 14th Amendment due process requirements of prosecutoral reprisal as set out in Blackledge v. Perry 417 U.S. 21, 40 L.Ed. 2d. 628, 94 S. Ct. 2098 (1974)

The Wisconsin Court held that the

standard of review was not "just an 'appearance of vindictiveness'" but that Brookens must also demonstrate a "realistic likelihood of vindictiveness" because the prosecutor added, without explanation, the extra charges after Brookens' acquittal and mootness of the damage potential of the witnesses testimony and did not substitute and more "severe" charge citing U.S. v. Andrews 633 F2.d 449 (6th Cir. 1980) at 454. The standard applied by the Wisconsin Court clearly conflicts with the requirements of Blackledge and the Constitution, Miracle v. Estelle 592 F.2d 1269 (1979) (5th Cir.).

The Wisconsin trial court, in deciding the issue, initially held the matter in abeyance, and subsequently failed to rule at all on the issue.

ARGUMENT

Defendant, in his appeal to the Wisconsin Supreme Court, (Brief, p.4) specified in greater detail reprisal actions of the prosecutor. "Defense counsel, by his April 2, 1984 affidavit (23:3), stated that the prosecutor was extremely upset at the decision in case No. 82 CM 1884 meaning that he was upset that the jury had found the defendant not guilt of the battery charge. By that same affidavit the prosecutor showed his inclination to overstep the bounds of his discretion by stating that after the misdemeanor batter charge had been brought and before the defendant was tried he informed the defendant's trial counsel at that time that if the defendant did not go into the first offender's program for the battery case that he would dismiss that complaint and recharge the defendant with battery and

theft. The Defendant did not go into the first offender's program but chose to exercise his constitutional right to a jury trial on the battery charge. The prosecutor did not dismiss the battery charge. Four months after the trial on February 15, 1984, the prosecutor filed all the previous mentioned more serious charges."

Four months after the witness testified, and that testimony was credited by the jury's acquittal, the prosecutor filed the charge of witness intimidation and others. The Wisconsin Appeals Court misread the standard in failing to grant relief because the Defendant, it felt, must demonstrate a "realistic likelihood of vindictiveness" United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) and would not find an "appearance of vindictiveness."

The defendant is entitled to the right to a jury trial in an environment non-coerced to give up that right by prosecutoral reprisal. Actions to the contrary are suspect and adverse to the integrity of our judicial system. Protection against prosecutoral retribution certainly are on par with other Constitutional protections to defendants. U.S. v. Alvarado-Sandoval 557 F. 2d 645 (9th Cir. 1977), right to supress evidence; U.S. v. DeMarco 401 F. Supp 505, 508 (D.C. Cal. 1975), affirmed 550 F. 2d 1224 (9th Cir.), cert. denied 434 U.S. 827 (1977), right to change venue; U.S. v. Groves, 571 F. 2d 450, 453 (9th Cir. 1978), right to a speedy trial; and Blackledge v. Perry, supra, right to appeal.

DEFECTIVE COMPLAINT AND STATUTE

In Wisconsin, the Criminal Complaint is the initial charging document, reviewed by an impartial magistrate to determine whether probable cause existed or not. Apart form issues of clarity of the statutes and specificity of intent and coercion against a witness raised her, the judge trying the initial assault case against Mr. Brookens, sua sponte, refused to approve the Complaint. The omission of the fact that Mr. Brookens had been acquitted of the alleged acts observed by the witness mooted the charges. Whatever the witness allegedly saw, arguendo, was not criminal conduct by virtue of the acquittal four months earlier. The initial judge apparently recognized this and the prosecution did also, perhaps the reason why this material fact was omitted from the

complaint. Untrue facts, or those in reckless disregard of the truth deprives the court of jurisdiction, Franks v. Delaware, 438 U.S. 154 (1978), State v. marshall 92 Wis. 2d 101, 284 N.W. 2d 592 (1979), all to the same extent that omission of critical facts leave the Court without jurisdiction. State v. Mann, 123 Wis. 2d 375, 386, 367 N.W. 2d 209 (1985).

With four months to draft the complaint, and painstaking care to detail facts of the alleged battery and alleged theft, the prosecutor deliberately omitted, or perhaps, negligently omitted one key fact. The Defendant was tried and acquitted by a jury of the charges.

On these grounds, this Court is requested to set aside the conviction.

CONCLUSION

The Wisconsin Court in ruling on the issue of reprisal, Constitutional vagueness and precision of the Statutes, utilizes standards at variance with controlling federal standards. Those rulings must be set aside as violative of fundamental fairness and damaging to principles of due process and equity of unbiased prosecutions.

Submitted this 14th day of March 1989.

Benoit Brookens
Counsel for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Certiorari was mailed 14th day of March 1989 to the Office of the Dane County District Attorney, Martin Luther King, Jr. Boulevard, Madison, 53709, by depositing in the mail, postage first class prepaid.

Benoit Brookens

No. 87-15566-CR

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

June 23, 1988

Plaintiff-respondent

v.

HERBERT G. BROOKENS,

Defendant-Appellant.

APPEAL from a judgment and order of the circuit court for Dane county: MARK A. FRANKEL, JUDGE. Affirmed.

Before Gartzke, P.J. Dykeman, J. and Eich, J.

DYKMAN, J. Herbert D. Brookens appeals from a judgment convicting him of violating sec. 940.43(3), Stats., felony intimidation of a witness, and from an order denying post-conviction relief. The issues are: (1) whether secs. 940.42[1] and 940.43(3)[2] are constitutionally vague or overbroad; (2) whether Brookens was

entitled to a presumption of prosecutorial vindictiveness; (3) whether Brookens was deprived of due process of law due to an omission of material fact in the complaint; (4) whether the trial court abused its discretion by not severing two intimidation charges; (5) whether Brookens' trial counsel's failure to request a lesser included offence deprived Brookens of effective assistance of counsel.

We conclude that: (1) Sections 940.42 and 940.43(3), stats., are not unconstitutionally vague and overbroad; (2) that Brookens was not entitled to a prosecutorial vindictiveness presumption; (3) that the complaint had no material omission; (4) that the trial court did not abuse its discretion in not severing the intimidation charges; and (5) that Brookens' trial counsel's failure to request a lesser included offense did not

deprive Brookens of effective assistance of counsel. Therefore we affirm.

FACTS

Brookens was charged with and acquitted of battering Tanya McDonald. Renee Savannah, who witnessed the alleged battery, testified at Brookens' trial. After Brookens' acquittal, the prosecuting attorney brought several charges against Brookens, among them felony intimidation of a witness and victim in violation of secs. 940.43(3) and 940.45(3), Stats.

The witness intimidation charge was based on an incident at the Dane County Jail on September 22, 1983. At that time, Savannah was visiting inmates as part of her duties as a legal intern. Brookens, in jail because of the battery charge, asked to speak with Savannah. Savannah testified that the following exchange took place:

A. [H]E asked me was I planning to still testify. I said to him... I will testify just as to what I saw,...[H]e said that I am going to have a hearing today and I am going to be our of here, and you just better watch it.

...

A.I asked Herbert, I said are you threatening me, and I asked him because I couldn't believe it, and he said that I will be out today and you had better watch it. At that time I was very scared, and I just cut the whole conversation to a halt, and that was the end of the conversation.

...

A.[Brookens'] tone was very hostile, and it appeared he was angry.

....

A. I believe that Herbert was attempting to prevent me or make my mind up for me not to testify in the State's case.

Q. Did you beleive it was a threat?

A. Yes, I did.

A jury found Brookens guilty of felony intimidation of a witness. At a post-conviction hearing, the trial court denied all motions for relief.

ARE SECS. 940.42 AND 940.4393) UNCONSTITUTIONALLY VAGUE?

Brookens argues that Secs. 940.42 and 940.4393), Stats., are unconstitutionally vague. We review the question of a statute's constitutionally de novo. Ripley v. Brown, 141 Wis. 2d 447, 450, 415 N.W. 2d 550, 551 (Ct. App. 1987).

One challenging the constitutionality of a law bears a heavy burden. All legislative acts are presumed to be constitutional, and a challenger, to be successful, must prove unconstitutionality beyond a reasonable doubt. it is not enough to establish doubt as to the constitutionality of the act,

or to show that it is probably unconstitutional. We will "indulge [] every presumption and sustain the law if at all possible."

Montgomery Ward & Co. v. Rev. Dept., 142 Wis. 2d 772, 781-82, 419 N.W. 2d 348, 352 (Ct. App. 1987).

Brookens assets that the term "maliciously" in sec. 940.42 Stats., is not defined in the statutes. Brookens is wring. Section 940.41 provides in pertinent part: "In ss . 940.42 to 940.49: (1) ...'malicoiusly" menas an intent to vex, annoy or injure in any way another person or thwart or interfere in any manner with the orderly administration of justice."

Brookens does not allege that this definition is vague.

Brookens alleges that the undefined phrase "implies threat of force" in sec. 940.43(3), Stats. does not give him fair notice of the prohibited conduct. He argues that it is difficult for a speaker to know what a listener might contstrue as an implied threat, and that the statute allow prosecution for speech that may be devoid of any threat.

A statute is unconstitutionally vague id if doe not alert a person of ordinary intelligence to the type of conduct that is

prohibited. State v. McCoy , 139 Wis. 2d 291, 296, 407 N.W. 2d 319, 322 (Ct. App. 1987). The statute put Brookens on notice that he may not threaten a witness, implied or expressly, in order to influence the witness not to testify. Brookens concedes that any threat in this case would have to be "implied by such things as the conduct of the person at the time the words were spoken and the tone of voice used." We agree. However, "[a] statute is not void for vagueness simple because the legal or illegal nature of particular conduct is not easily ascertained." Id. We conclude that the phrase "implied threat of force is not vague.

IS SEC. 940.43(3), STATS., OVERBROAD?

Brookens also assets that the phrase "implied threat of force" is overbroad. " A statue is overbroad when its language, given it nornal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate." State v.Johnson, 108 Wis. 2d 703, 708, 324 N.W. 2d 447, 449 (Ct. App. 1982). Brookens is allowed to assert this challege even though his own speech may not be constitutionally protected. Id. at 709, 324 N.W. 2d at 450.

Section 940.43(3), Stats., is directed at speakers to threaten witnesses with force or violence to keep them from testifying.

Brookens alleges that a defendant may attempt to dissuade a witness form participating in what the defendant feels is an unjust prosecution. Brookens also compares using a threat of force to keep a witness form testifying with plea bargaining or offers to settle before trial. We reject Brookens' analogies. First of all, no defendant may "maliciously and knowingly" with an implied threat of force, attempt to dissuade a witness from testifying at a trial. Sections 940.42 and 940.43(3), Stats. Brookens cites no authority for the proposition that there is an exception to this law if the defendant considers the prosecution unjust. We will not consider such

argument on appeal. State v. Lale, 141 Wis. 2d 480, 486 n. 1, 415 N.W. 2d 847, 850 (Ct. App. 1987).

Plea bargaining is allowed because of a "'mutuality of advantage' to the defendants and prosecutors, each with his [or her] own reasons for wanting to avoid trial." Brodenkircher v. Hayes, 434 U.S. 357, 363 (1978). The sale rationale applies to settlement negotiations in a civil matter. No mutuality if advantage exists when a witness is intimidates. Brookens' reliance on State v. Dronso, 90 Wis. 2d 110, 279 N.W. 2d 710 (Ct. App. 1979) is misplaced. In Droso, the court held that a statute which prohibited phone

calls made with the intent to annoy was unconstitutionally overbroad because the persons can make legitimate calls with the intent to annoy the recipient. Id. at 117, 279 N.W. 2d at 714. No threat of force or violence to prevent a witness from testifying can be legitimate. We conclude that the phrase "implied threat of force" as used within sec. 940.4393) Stats., applies only to conduct which the state is permitted to regulate. Therefore Sec. 940.4393) is not overbroad.

PROSECUTORIAL VINDICTIVENESS

Brookens alleges that he was charge with felony intimidation of a witness due to prosecutorial vindictiveness in violation of

his fourteenth amendment right to due process. He alleges that the following fact indicate either prosecutorial vindictiveness or the appearance of such: (1) Brookens pursued his right to a jury trial and was acquitted of the battery charge against him; (2) the prosecutor subsequently brought numerous charges against Brookens, two of which were predicated on the underlying battery charge;[3] (3) the original trial judge refused to sign the complaint against Brookens on the new charges; and the (the complaint did not contain the fact that Brookens had been acquitted of the battery charge.

"Because the historical fact

of this case are not in dispute and because the dispute concerns the constitutionality and statutory significance of those facts, this case is subject to independent appellate review." State v. Stevens, 123 Wis. 2d 303, 313-14, 367 N.W. 2d 788, 794, Cert. denied, 474 U.S. 852 (1985).

....

By the Court.

--Judgment and order affirmed.

Inclusion in the official reports is not recommended.

COURT OF APPEALS

OF WISCONSIN

P.O. BOX 1688

MADISON, WI 53701-1688

DISTRICT 4

REMITTITUR

STATE OF WISCONSIN,

Plaintiff-Respondent, Appeal No

v. 87-1566-CR

HERBERT G. BROOKENS, T.Ct. No. 84 CF 152

Defendant-Appellant

This cause was an appeal to review the judgment and order of the Circuit Court of Dane County, it is ordered and ajudged by this Court in an opinion filed on June 23, 1988, that:

"Judgment and order affirmed."

CPD Wrote Decision/ opinion

Panel: HON. Paul C. Gartzke

HON. Charles P. Dykman

HON. William Eich

The appeal record is hereby returned to the clerk of the circuit Court for Dane County.

I certify that the above is a correct transcript of the original order and judgment of the court in the above entitled cause.

Dated:

September 21, 1988

/s/MLG

Marilyn L. Graves

Clerk, Court of

Appeals

Office of the Clerk
S U P R E M E C O U R T
State of Wisconsin

Hon. Mark A. Frankel
Circuit Court for Dane County
City-County Bldg.
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Madison Sept. 20, 1988

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The Court today announced an order in your case as follows:

No. 87-1566-CR State v. Brookens
(T.C. #84 CV 152)

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Herbert G. Brookens, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

Heffernan, C.J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court